Court of Appeal No. COA-22-CV-0451
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3 AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

RESPONDING FACTUM OF THE PROPOSAL TRUSTEE KSV RESTRUCTURING INC.

March 23, 2023

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Robin B. Schwill (LSO#38452I)
rschwill@Davies.com
Tel: 416.863.0900

Lawyers for the Respondents, the Proposal Trustee, KSV Restructuring Inc.

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PART I – OVERVIEW

1. On April 30, 2021, YG Limited Partnership and YSL Residences Inc. (together, "**YSL**" or the "**Debtor")** filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* (the "**BIA**"), which were procedurally consolidated pursuant to an Order of the Court on May 14, 2021.[1]

2. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the report dated September 12, 2022 (the "**Seventh Report**") prepared by KSV Restructuring Inc., in its capacity as the proposal trustee (the "**Proposal Trustee**").[2]

3. This appeal, by certain of the limited partners of YSL (the "**YongeSL LPs**"), concerns the November 22, 2022 Revised Endorsement rendered by Justice Osborne (the "**Decision**")[3] allowing CBRE Limited's ("**CBRE**") appeal pursuant to section 135(4) of the BIA regarding the disallowance of its claim (the "**Proof of Claim Motion**"). The Appellants claim that Justice Osborne erred in concluding that: (a) they lacked standing in the proceeding; and (b) CBRE had met its onus to prove its claim. The Proposal Trustee submits that Justice Osborne did not make either of these errors and accordingly this appeal should be dismissed.

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1 Seventh Report of the Proposal Trustee dated September 12, 2022 ("**Seventh Report**") at para 1.0(1) [ABCO, Tab 9, p. 93].

2 Seventh Report [ABCO, Tab 9, pp. 93-101].

3 *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548 (the "**Decision**") [ABCO, Tab 3, pp. 30-37].

4. Depending on the final resolution of the remaining three Disputed Claims in these proceedings there may be monies available to distribute to the YongeSL LPs. The YongeSL LPs, however, are not creditors of YSL.

5. The BIA is a commercial statute and the scheme set out thereunder is summary in nature. The administration and determination of claims is clearly the mandate of the trustee pursuant to section 135 of the BIA.

6. Having the trustee administer claims in such a manner is in accordance with the summary nature of the BIA and maintains its expediency and efficiency. This avoids time consuming and costly litigation for each and every claim.

7. Accordingly, claim adjudication in a proposal proceeding under the BIA is, by design, a process between the trustee, the creditor claimant and the debtor. If others wish to intervene in this process, then the statutory jurisdiction to do so must exist under the BIA. This statutory jurisdiction only exists pursuant to section 135 and section 37 of the BIA.

8. Justice Osborne did not err in deciding that the YongeSL LPs had no automatic right to be heard in this particular instance simply because their economic interest could be affected. Justice Osborne correctly considered the application of section 135(5) and section 37 of the BIA to the facts in this case. The discretionary decisions that Justice Osborne made with respect to the weight of the evidence before him should be afforded a high degree of deference.

9. Furthermore, Justice Osborne did not err in not referencing a prior decision of Justice Dunphy on an entirely different set of applications that made no ruling whatsoever on standing. The reason that standing of the YongeSL LPs on the motion to sanction the original proposal was not an issue was because they were applicants in a separate civil proceeding against Cresford and YSL which claimed, in part, that YSL had no authority under its limited partnership agreement to have initiated the proposal proceedings. Justice Dunphy simply directed that those particular and directly related assertions should be dealt with in conjunction with the motion seeking the sanction of the proposal.

10. Lastly, in carrying out its administrative duty under section 135 of the BIA, the role of the trustee is not to obtain absolute certainty that a claim should be allowed. Rather, the trustee must be commercially pragmatic and need only satisfy itself that in good faith it is reasonable to conclude that a claim exists and, if so, allow it. Accordingly, in duly considering the facts and circumstances before him Justice Osborne did not err in concluding that CBRE had proven its claim.

PART II – THE FACTS

A. THE PARTIES

(i) The Debtor

11. The Debtor companies are special purpose entities that were established to hold the assets of a large real estate development in downtown Toronto known as the "**YSL Project**". The Debtor intended to build the YSL Project, which consisted of an 85+ floor tower with residential and commercial space (the "**Real Property**").[4] The Debtor is a part

[4] Seventh Report, at para 2.0(3) [ABCO, Tab 9, p. 95].

of the Cresford group of companies. Cresford is a real estate development company.[5] To the knowledge of the Proposal Trustee, Cresford no longer has any active projects.

(ii) The Sponsor

12. The "**Sponsor**" is a large real estate development company that has completed projects across Canada and internationally. The Sponsor acquired the YSL Project through the Proposal, which was approved by the Court on July 16, 2021.[6]

13. As part of the Proposal, the Sponsor funded the "**Affected Creditors Cash Pool**" in the amount of $30.9 million.[7] The proven claims of creditors of the Debtor are to be paid from the Affected Creditors Cash Pool. Once all proven claims are paid out, the remaining cash in the Affected Creditors Cash Pool, if any, is to be distributed to the limited partners of YSL including the YongeSL LPs.[8]

14. The Sponsor is also the largest proven creditor of the estate, as it took an assignment of proven claims of various third parties against the Debtor. In total, the Sponsor purchased approximately $12 million of proven claims.[9]

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5 Seventh Report, at para 2.0(1) to 2.0(5) [ABCO, Tab 9, p. 96].
6 Seventh Report, at para 1.0(11) [ABCO, Tab 9, p. 94].
7 Seventh Report, at para 3.0(1) [ABCO, Tab 9, p. 97].
8 Seventh Report, at para 3.0(1) [ABCO, Tab 9, p. 97].
9 Seventh Report, at para 4.0(7) [ABCO, Tab 9, p. 98]. The Proposal Trustee made an interim distribution of 70 cents on the dollar to creditors with proven claims. The Sponsor, as assignee of $12 million of proven claims, received $8.4 million through the interim distribution.

(iii) CBRE

15. CBRE is a commercial real estate brokerage. CBRE made a claim for approximately $1.2 million in these proceedings for services rendered as exclusive listing broker for the YSL Project (the "**CBRE Claim**").[10]

16. The CBRE Claim relates to an invoice submitted by CBRE to "Cresford" dated October 13, 2021 and is in respect of services rendered by CBRE serving as the exclusive listing broker for the YSL Project pursuant to an unsigned listing agreement between CBRE and Residences (the "**Listing Agreement**").[11]

17. The term of the Listing Agreement is six months from February 20, 2020 to August 20, 2020 (the "**Term**"), subject to the "**Holdover Clause**" in the Listing Agreement.[12] The Real Property was conveyed to the Sponsor on or about July 22, 2021 as a consequence of implementing the Final Proposal.[13]

18. One of the key issues in respect of the CBRE Claim is the applicability of the Holdover Clause[14] in the Listing Agreement, which reads as follows:

> HOLDOVER
>
> 4.1
> The Owner further agrees to pay the Brokerage the Commission if, within 90 calendar days after the expiration of the Term, the Property is sold to, or the Owner

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10 Seventh Report, at para 5.0(1) [ABCO, Tab 9, p. 99].
11 Seventh Report, at para 5.0(1) [ABCO, Tab 9, p. 99].
12 Seventh Report, at para 5.0(4) [ABCO, Tab 9, p. 99].
13 Seventh Report, at para 2.0(5) [ABCO, Tab 9, p. 99].
14 Seventh Report, at para 5.0(3) [ABCO, Tab 9, p. 99].

> enters into an agreement of purchase and sale for the Property with, or negotiations continue, resume or commence and thereafter continue leading to the execution of a binding agreement of purchase and sale for the Property, provided the transaction subsequently closes, with any person or entity (including his/her/its successors, assigns or affiliates) with whom the Brokerage has negotiated (either directly or through another agent) or to whom the Property was introduced or submitted, from any source whatsoever, or to whom the Owner was introduced, from any source whatsoever, prior to the expiration of the Term; with or without the involvement of the Brokerage. The Brokerage is authorized to continue negotiations with such persons or entities. The Brokerage agrees to submit a list of such persons or entities to the Owner within 10 business days following the expiration of the Term, provided, however, that if a written offer has been submitted, then it shall not be necessary to include the offeror's name on the list.

19. The Holdover Clause would only be applicable if "*negotiations continue, resume or commence*" with the Sponsor, within such 90-day period and the Sponsor was someone "*to whom the Property was introduced or submitted, …, or to whom the Owner was introduced … prior to the expiration of the Term*".

20. Dave Mann, the CFO of Cresford, advised the Proposal Trustee that CBRE introduced Cresford to the Sponsor. The Sponsor advised the Proposal Trustee that "Cresford, through its representative Ted Dowbiggin, first approached Concord in early 2020 to discuss four of Cresford's distressed projects, however Concord did not have any interest in the YSL project at this time." and that "In September/October 2020, Cresford re-engaged Concord to discuss the YSL project, after it had canvassed a number of other developers. After this outreach in fall 2020 until the time of the proposal proceedings, Cresford and Concord were consistently engaged to explore potential alternatives for the YSL project".[15]

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[15] Seventh Report, at Appendix D, Notice of Disallowance of Claim, at p. 2 [Proposal Trustee's Compendium, Tab 1].

21. Given the conflicting information provided to the Proposal Trustee by Cresford and the Sponsor, as well as the nature of these proceedings with a history of other stakeholders claiming to have information relevant to the Proposal Trustee's assessments, the Proposal Trustee determined that the best and most transparent way of determining the CBRE Claim based on the information available to it at the time was to disallow the claim on the basis set out in the CBRE Notice[16] and to permit CBRE, in turn, to file a full evidentiary response by way of an appeal on notice to all. In this way, all parties would be able to review and respond to the evidence on one complete record rather than all evidence only being provided to the Proposal Trustee.

22. Following the issuance of the CBRE Notice, counsel for the Sponsor copied the Proposal Trustee on email correspondence with counsel for CBRE. In that correspondence, the Sponsor stated that while CBRE had introduced the Sponsor to Cresford, the Sponsor had no "*knowledge of a brokerage agreement or similar arrangement between Cresford and CBRE relating to the project formerly known as Yonge Street Living (YSL) residences*".[17]

23. CBRE appealed the disallowance. It provided evidence contradicting information provided by the Sponsor that there was not an ongoing dialogue between it and CBRE. CBRE's evidence indicates that it was involved in introducing the YSL Project to the Sponsor during the Term and that negotiations between the Debtor and Sponsor continued until approval and implementation of the Proposal. No one filed any contesting

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16 Seventh Report, at para 5.0(2) [ABCO, Tab 9, p. 99].
17 Seventh Report, at para 5.0(8) [ABCO, Tab 9, p. 100].

evidence. The YongeSL LPs cross-examined CBRE's affiants which raised no issues with the evidence provided.

24. On the basis of CBRE's material, the Proposal Trustee did not oppose CBRE's appeal. Neither the Debtor nor any creditor opposed CBRE's appeal. The only party who opposed was the YongeSL LPs.

B. THE PROOF OF CLAIM MOTION

25. Justice Osborne rendered the following holdings in the Proof of Claim Motion:

> [58] For all of the above reasons, a. the limited partners do not have standing to oppose or *[sic]* the relief sought on this motion by the creditor [CBRE] supported by the Proposal Trustee and the Debtors; b. in this case, the appeal from the decision of the Proposal Trustee should be considered, and has been considered by me, as a hearing de novo, since to do otherwise would result in an injustice to the creditor [CBRE]; and c. the appeal should be allowed and the motion granted.
>
> [59] Accordingly, the disallowance of CBRE's claim by the Proposal Trustee is set aside and the claim is allowed.[18]

26. The YongeSL LPs appeal from the Decision claiming that Justice Osborne erred in determining the YongeSL LPs lacked standing on CBRE's appeal because:

(a) the YongeSL LPs have the right to be heard in circumstances where their interests are affected by the decision;

(b) the Motion Judge relied on section135(5) of the BIA in order to determine standing, which had no application to the relief sought on CBRE's motion;

(c) the Motion Judge failed to follow the decision of Justice Dunphy that previously determined that the YongeSL LPs have standing in this proceeding; and

(d) the Motion Judge interpreted section 37 of the BIA too narrowly in concluding that the YongeSL LPs were not "persons aggrieved".

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[18] Decision, 2022 ONSC 6548 at paras 58-59 [ABCO, Tab 3, p. 36].

27. The YongeSL LPs further claim that Justice Osborne erred in concluding that CBRE had proven its claim because:

(a) the vague evidence before the Motion Judge was not capable of supporting CBRE's claim; and

(b) CBRE failed to meet its onus under section 135(4) of the BIA of demonstrating that its claim should be allowed.

28. The YongeSL LPs seek an order setting aside the order of Justice Osborne and granting an order in its place (a) dismissing CBRE's motion; (b) declaring that the CBRE Claim is disallowed in full; (c) awarding the YongeSL LPs the costs of the motion below and of this appeal; and (d) declaring that the YongeSL LPs have standing in this appeal.

29. For the reasons that follow, the Proposal Trustee believes this appeal should be dismissed in its entirety.

PART III – ISSUES

30. There are three issues on this appeal relating to the right of the YongeSL LPs to be heard (i.e., their standing) on the Proof of Claim Motion:

(a) Did Justice Osborne incorrectly apply the framework under section 135 of the BIA for the admission and disallowance of proofs of claim?

(b) Did Justice Osborne offend the principle of horizontal judicial comity by not following Justice Dunphy's earlier approach?

(c) Did Justice Osborne interpret section 37 of the BIA too narrowly in concluding that the YongeSL LPs were not "persons aggrieved"?

31. The fourth issue on this appeal is whether Justice Osborne erred in concluding that CBRE had proven its claim.

32. The Proposal Trustee submits that the answer to all four issues is "no".

PART IV – LAW & ARGUMENT

A. STANDARD OF REVIEW

33. The standard of review on an appeal from a motion judge's decision based on a determination of law is correctness.[19] However, the standard is one of palpable and overriding error where the issue concerns the relative weight or degree of importance to be given to particular factors.[20]

34. Accordingly, the first three legal issues raised on this appeal are to be assessed on a correctness standard and the appellate court should only intervene if it concludes that the Decision failed to apply correct legal principles. The fourth issue – whether Justice Osborne's erred in holding that CBRE had proven its claim – is a discretionary decision that should be afforded a high degree of deference on appeal.

B. NO AUTOMATIC RIGHT TO BE HEARD

35. "The Act puts day-to-day administration into the hands of trustees in bankruptcy and inspectors as business people and professionals; it is intended that the administration should be practical not legalistic, and the Act should be interpreted to give effect to this intent: *Re Rassell* (1999), 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 177 D.L.R. (4th) 396, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.)."[21]

36. Claim adjudication in a proposal proceeding under the BIA is, by design, a process between the trustee, the creditor claimant and the debtor. In order to safeguard the efficiency and expediency of this process, if others wish to intervene, then the statutory

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19 *Housen v. Nikolaisen*, 2022 SCC 33 at para 8 [ABOA, Tab 4].

20 *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para 26 [Proposal Trustee's BOA, Tab 4].

21 Houlden, Morawetz, and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022, §1:8 [Proposal Trustee's BOA, Tab 8].

jurisdiction to do so must exist under the BIA. This statutory jurisdiction only exists pursuant to section 135 and section 37 of the BIA.

37. Therefore, Justice Osborne did not err in deciding that the YongeSL LPs had no automatic right to be heard on CBRE's appeal pursuant to section 135(4) of the BIA simply because their economic interest could be affected. Rather, Justice Osborne correctly considered the application of sections 135(5) and 37 of the BIA to the YongeSL LPs given the facts in this case. There certainly was no palpable and overriding error in his reasons.

C. THE DECISION CORRECTLY APPLIED SECTION 135 OF THE BIA

38. The YongeSL LPs claim that Justice Osborne incorrectly concluded that they did not have standing in the Proof of Claim Motion because he incorrectly applied section 135(5) of the BIA rather than section 135(4) of the BIA. They further claim that Justice Osborne applied the incorrect burden of proof under section 135(5) of the BIA.

(i) Standing

39. First, it is important to observe that while Justice Osborne held that the YongeSL LPs lacked the requisite standing to oppose the Proof of Claim Motion under section 135(5) of the BIA, he "considered their evidence and arguments with respect to the merits of the appeal."[22]

40. Accordingly, had Justice Osborne reached a different conclusion on standing, the outcome of the Proof of Claim Motion would still be the same.

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22 Decision, 2022 ONSC 6548 at para 39 [ABCO, Tab 3, p. 34].

41. Second, the subsections found in section 135 of the BIA operate together to provide the process for determinations and disallowances of proofs of claim and Justice Osborne correctly applied section 135(5) in this context.

42. Upon correctly deciding that the YongeSL LPs had no automatic right to be heard on CBRE's appeal pursuant to section 135(4) of the BIA simply because their economic interest could be affected, the only other possible subsection available to provide the YongeSL LPs' standing was section 135(5).

43. Section "135(5) of the BIA provides that the court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter... Indeed, s. 135(4) deals with the creditor's remedy where it is dissatisfied with the disallowance of its claim, whereas s. 135(5) deals with the situation where other creditors are dissatisfied with either the failure of the trustee to make a decision with respect to the proof of claim of another creditor or, more often, with the decision of the trustee to admit a claim."[23]

44. In this case, there was no failure of the trustee to make a decision with respect to the CBRE Claim. At first instance, the Proposal Trustee had disallowed it.

45. Furthermore, both sections 135(4) and (5) of the BIA are creditor remedies.[24] The YongeSL LPs are not creditors. Accordingly, had Justice Osborne (incorrectly) proceeded

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23 Louise Lalonde, "It All Began With Galaxy: Appeals and Trials De Novo in Insolvency Revisited" 2013 ANNREVINSOLV 27, at p. 7 [Proposal Trustee's BOA, Tab 12].

24 *Royal Bank of Canada v. Insley*, 2010 SKQB 17 at para 26 [Proposal Trustee's BOA ,Tab 7].

under section 135(4), there could have been no substantive change to the analysis on the standing of the YongeSL LPs.

(ii) Burden of Proof under section 135

46. As the Appellants note, "the onus on a section 135(5) challenge is on the party challenging the claim."[25] Justice Osborne considered "the clear and unequivocal evidence" before him detailed in paragraphs 44-57 of the Decision[26] on a hearing *de novo* and found that the appeal should be allowed.

47. Further, the distinction that the Appellant suggests between the burden of proof under section 135(4) and 135(5) is not accurate,[27] and had Justice Osborne made his decision on the YongeSL LPs' standing pursuant to section 135(4), there would not have been a difference in the burden of proof required.

(iii) Summary on the Application of Section 135 in the Decision

48. In summary: (a) the issues raised by the Appellants with respect to standing under section 135 of the BIA are moot because Justice Osborne considered their evidence and arguments; and (b) while Justice Osborne correctly applied section 135(5) of the BIA to the issue of the YongeSL LPs' standing, the issues the Appellants raise with respect to the application of section 135(5) versus 135(4) of the BIA are inconsequential because

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25 *Karataglidis, Re*, 2003 CanLII 64281 at paras 6-8 (Ont. Registrar) [ABOA, Tab 17]; *Asian Concepts Franchising, Re*, 2018 BCSC 1022 affirmed that the applicant bringing a 135(5) application bears the onus to show, on a balance of probabilities, that another creditor's claim should be reduced at paras 50-51 [Proposal Trustee's BOA, Tab 1].

26 Decision, 2022 ONSC 6548 at paras 44-57 [ABCO, Tab 3, pp. 35-36].

27 The Court in *Mamczasz Electrical Ltd. v. South Beach Homes*, 2010 SKQB 182 held that the creditor also bears the onus of establishing its claim in a section 135(4) appeal at paras 42 and 44 [Proposal Trustee's BOA, Tab 3].

the application of both provisions limit the remedy to creditors and require the same burden of proof.

D. HORIZONTAL JUDICIAL COMITY WAS FOLLOWED

49. The Appellants reference Justice Dunphy's June 1, 2021 decision on a motion seeking to declare that the stay of proceedings does not apply to them or in the alternative to lift the stay.[28] Contrary to the Appellant's assertion, Justice Dunphy's decision is not a ruling on the standing of the YongeSL LPs in claim adjudication matters in these proposal proceedings.

50. Further, as Justice Dunphy states at paragraph 3, "while I was invited to make a ruling on the applicability of the BIA stay of proceedings…I declined to do so."[29]

51. Justice Dunphy did conclude at paragraph 6 that "they ought to be heard in the context of the sanction hearing."[30] The reason that the YongeSL LPs were granted standing on the motion to sanction the original proposal was because they were applicants in a separate civil proceeding against Cresford and YSL (heard in part at the same time) which claimed, in part, that YSL had no authority under its limited partnership agreement to have initiated the proposal proceedings in the first place.

E. THE DECISION PROPERLY APPLIED SECTION 37 OF THE BIA

52. Justice Osborne decided as a preliminary matter that the YongeSL LPs were not "persons aggrieved" under section 37 and, accordingly, it was not necessary for him to

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28 *In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc* (June 1, 2021), Toronto 31-2734090 (ONSC Commercial List) ("**Stay Motion**") [ABOA, Tab 2].

29 Stay Motion, at para 3 [ABOA, Tab 2].

30 Stay Motion, at para 6 [ABOA, Tab 2].

decide or to consider whether the Yonge SL LPs needed to rely on section 37 of the BIA at all.

53. As Justice Osborne set out, "[t]he cases regarding the definition of an "aggrieved person" establish that it is necessary for a claimant to demonstrate that it was deprived of a legal right or was otherwise wrongfully deprived of something."[31]

54. The case law does not support the Appellant's claim that "persons aggrieved" "encompasses all persons whose rights to a bankrupt's estate are affected by a decision of a trustee". The Appellants provide no case law in support of this proposition.

55. Further, a person or party having a particular role (e.g. shareholder) in one proceeding, may not meet the test for "persons aggrieved" in another proceeding as the determination is based on the particular facts of the particular proceeding.

56. As Justice Pepall (as she then was) held with respect to shareholders bringing a section 37 application:

> "[14]The role of a shareholder in bankruptcy proceedings is not clearly defined. There are situations where a shareholder of the bankrupt may be permitted to bring a section 37 application for permission to bring an action that a trustee has declined to bring: *Churchill Pulp Mill Ltd. v. Manitoba.* Similarly, a shareholder of a bankrupt company is an "interested person" within the context of a section 119 (2) application to review and revoke decisions and actions of inspectors of the estate: *NSC Corp v. ABN Amro Bank Canada*. The case before me, however, does not engage either of those sections of the BIA."[32]

57. The Appellants further claim that Justice Osborne's holding on the application of section 37 of the BIA was wrong from a policy perspective.

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31 *Global Royalties Ltd. v. Brook*, 2016 ONSC 6277 at para. 13 [ABOA, Tab 9].

32 *OSFC Holding Ltd, Re*, 2004 CanLII 35000 (Ont. Sup. Ct.) at para 14 [Proposal Trustee's BOA, Tab 5].

58. The Appellants claim that Justice Osborne erred in concluding that "[t]heir grievance, or complaint, boils down to the fact that their ultimate potential recovery will presumably be reduced if the claim is allowed. That is not sufficient to make them aggrieved within the meaning of section 37. To conclude otherwise would mean that every creditor would have standing pursuant to section 37 to challenge the claim of every other creditor in a bankruptcy proceeding and I reject this notion."[33]

59. The Appellants claim that Justice Osborne's rationale for limiting the scope of section 37 of the BIA is incorrect because section 37 is an alternative to section 135(5) of the BIA and accordingly this possibility already exists. The Appellants incorrectly cite the case law comparing section 37 and section 215 (the provision requiring leave of the court to bring an action against the trustee, among others) of the BIA in support of this proposition.[34] Furthermore, the trustee must decline to interfere in the matter for a creditor to be able to bring an application under section 135(5), so it is not an automatic right of standing.

60. Based on the same rationale, Justice Osborne set out for his application of section 37 of the BIA the case law comparing section 37 and section 135 of the BIA that establishes that section 37 cannot be used by a creditor in place of section 135 to appeal a disallowance by a trustee.[35]

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33 Decision, 2022 ONSC 6548 at para 39 [ABCO, Tab 3, p. 33].

34 *PR Engineering Ltd. v. Clarke, Henning & Hahn Ltd.*, 1990 CanLII 8089 at para 6 (Ont. Sup. Ct.) [ABOA, Tab 14] and *GMAC Commercial Credit Corp – Canada v. TCT Logistics Inc.*, 2006 SCC 35 at para 66 [ABOA, Tab 13].

35 *Drummie, Re*, 2004 NBQB 35 at paras 15 and 16 [Proposal Trustee's BOA, Tab 2].

61. In summary, Justice Osborne's application of section 37 of the BIA to the YongeSL LPs is consistent with both the case law interpretation of the term "persons aggrieved" and the policy rationale behind the application of the term.

F. CBRE HAD PROVEN ITS CLAIM

62. The YongeSL LPs also contend that Justice Osborne erred in concluding that CBRE had proven its claim.

63. In deciding the validity of a claim, certainty is not the test. If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted. If a creditor adduces relevant and probative evidence from which a valid claim can be reasonably inferred, the test has been met and the claim is provable.[36]

64. As discussed above, CBRE's evidence illustrates an ongoing dialogue between the Sponsor and Cresford after such introduction that resulted in the transaction implemented through the Final Proposal. CBRE also provided evidence from Mr. Dowbiggin, a senior representative of Cresford, that Cresford dealt with CBRE on the basis that the Listing Agreement was in force, notwithstanding that it was never signed. In the Proposal Trustee's view, the ongoing dialogue between Cresford and the Sponsor, as well as Cresford's and CBRE's conduct related to the Listing Agreement suggests that the Holdover Clause applies and therefore entitles CBRE to its fee.

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[36] *Mamczasz Electrical Ltd. v. South Beach Homes Ltd.*, 2010 SKQB 182 [Proposal Trustee's BOA, Tab 3]; *Summit Glen Waterloo/2000 Developments Inc., Re*, 2016 ONCA 405 at paras 27-29 [Proposal Trustee's BOA, Tab 9].

65. Justice Osborne reviewed the evidentiary record before him in light of the arguments made by the YongeSL LPs and concluded as follows:

> [51] I am satisfied based on the evidence described above and particularly the evidence of Messrs. Dowbiggin and Gallagher, and in the absence of any contrary evidence put forward by any party, that the negotiations between YSL and Concord commenced with their introduction and continued until the acquisition of the YSL Property by Concord through the proposal, and specifically during the holdover period. The limited partners did not cross-examine either of those witnesses on their evidence with respect to these points. CBRE continued to act as listing broker and responded to questions from YSL during the negotiations. [emphasis added]
>
> [52] In addition, the Debtors themselves support the claim and have confirmed such to the Proposal Trustee. This is consistent also with the conduct of both the Debtors on the one hand and CBRE on the other, prior to the claim being advanced, as the parties to the agreement performed it according to its terms and acted in all respects as if the written agreement had been executed.
>
> [53] Finally, I observe that Concord itself supports the claim being allowed and it, very arguably, has the most to gain if the claim were denied.[37]
>
> (emphasis added)

66. The YongeSL LPs seem to complain that the evidence supporting CBRE's claim is not perfect nor exhaustive. But certainty is not the test. As long as the evidence in support of the claim is relevant and probative, which it is, the claim should be admitted.

67. Accordingly, Justice Osborne cannot be seen to have erred in concluding that CBRE had proven its claim under the circumstances.

PART V – CONCLUSION AND ORDER REQUESTED

68. In conclusion, Justice Osborne applied the correct tests under section 135(5) of the BIA and section 37 of the BIA to find that the YongeSL LPs lacked standing in the Proof of Claim Motion. Further, the points raised by the Appellants in this appeal are moot

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[37] Decision, 2022 ONSC 6548 at paras 51-53 [ABCO, Tab 3, p. 36].

as Justice Osborne considered the YongeSL LPs's evidence and positions, despite his decision on standing.

69. The Proposal Trustee does not oppose the position of the YongeSL LPs that there is no need to obtain leave to appeal the Decision based on section 193(c) of the BIA. However, it is important to highlight why the role of appellate courts in reviewing decisions, such as the Decision, has been limited in the insolvency and restructuring context.

70. As Professor Wood notes, appellate courts have expressed a reluctance to interfere with the exercise of discretion by the supervising court, "the real-time nature of restructuring proceedings also has significant implications in respect of the role of the appellate courts in reviewing the decisions of the supervising court…the appellate courts have recognized that the supervising judge is in the best position to balance competing factors at play in a restructuring proceeding."[38]

71. The Proposal Trustee requests an Order upholding the Revised Endorsement made by Justice Osborne on November 22, 2022, and dismissing this appeal.

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[38] Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015) at p. 436 [Proposal Trustee's BOA, Tab 12].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23th day of March 2023.

for

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Robin Schwill (LSO#38452I)
rschwill@Davies.com
Tel: 416.863.5502

Lawyers for the Respondents, the Proposal Trustee, KSV Restructuring Inc.

SCHEDULE A
AUTHORITIES

Case Law

1. *Asian Concepts Franchising, Re*, 2018 BCSC 1022

2. *Drummie, Re*, 2004 NBQB 35

3. *Global Royalties Ltd. v. Brook*, 2016 ONSC 6277

4. *GMAC Commercial Credit Corp – Canada v. TCT Logistics Inc.*, 2006 SCC 35

5. *Housen v. Nikolaisen*, 2002 SCC 33

6. *In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc.* (June 1, 2021), Toronto 31-2734090 (Ont. Sup. Ct. [Commercial List])

7. *Karataglidis, Re*, 2003 CanLII 64281 (Ont. Registrar)

8. *Mamczasz Electrical Ltd. v. South Beach Homes Ltd.*, 2010 SKQB 182

9. *New Skeena Forest Products Inc., Re*, 2005 BCCA 192

10. *OSFC Holding Ltd, Re*, 2004 CanLII 35000 (Ont. Sup. Ct.)

11. *PR Engineering Ltd. v. Clarke, Henning & Hahn Ltd.*, 1990 CanLII 8089 (Ont. Sup. Ct.)

12. *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, aff'd 2006 ABCA 293

13. *Sapient Grid Corp, Re*, 2012 ABQB 357

14. *Summit Glen Waterloo/2000 Developments Inc., Re*, 2016 ONCA 405

15. *Royal Bank of Canada v. Insley*, 2010 SKQB 17

16. *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548

Secondary Sources

17. Houlden, Morawetz, and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022.

18. Louise Lalonde, “It All Began With Galaxy: Appeals and Trials De Novo in Insolvency Revisited” 2013 ANNREVINSOLV 27

19. Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015).

SCHEDULE B
STATUTES AND REGULATIONS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Appeal to court against trustee

37 Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[…]

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

> **(a)** any claim;
>
> **(b)** any right to a priority under the applicable order of priority set out in this Act; or
>
> **(c)** any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[…]

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

[…]

No action against Superintendent, etc., without leave of court

215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No.: BK-21-02734090-0031

Court of Appeal No. COA-22-CV-0451

Court of Appeal for Ontario

IN THE MATTER OF THE BANKRPUTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3 AS AMENDED

RESPONDING FACTUM OF THE PROPOSAL TRUSTEE

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Robin Schwill (LSO# 38452I)
rschwill@dwpv.com
Tel.: 416.863.5502

Lawyers for the Responding Party,
The Proposal Trustee, KSV Restructuring Inc.